ing, as against this plaintiff, the said Business and Occupation Tax, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

2. That, pending the determination of this suit, the defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, be required to show cause, on a day certain to be fixed by this court, why a temporary injunction should not issue against defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, and against their agents, servants and employees, restraining and enjoining them from enforcing, as against this plaintiff, the said Business and Occupation Tax, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

3. That plaintiff do have and recover its costs and disbursements herein.

4. That plaintiff have such other and further relief as to the court may seem just and proper.

Grosscup, Morrow & Ambler, Attorneys for Plaintiff, 910 Republic Building, Seattle, Washington.

[fol. 5] *Duly sworn to by W. P. Alvick. Jurat omitted in printing.*

[fol. 6] EXHIBIT "A" TO COMPLAINT

The Puget Sound Stevedoring Company is a Washington corporation with headquarters at Seattle, Washington. It has been engaged for some years past and is now engaged in the general stevedoring business at Seattle and other ports on Puget Sound. It conducts its business in one of three methods:

First. Under contract with a shipowner or ship master to load or discharge a vessel at a specified rate per ton of cargo

handled or discharged, the rate varying with the commodity so handled. The stevedoring company here employs individual longshoremen, over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master.

Second. Under contract with the shipowner or ship master to load or discharge a vessel on a cost-plus insurance (employer's liability—workmen's compensation—public liability), plus commission basis. The stevedoring company here employs individual longshoremen, over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master. This method differs from "First" above only in the fact that the method of compensation paid is different.

Third. Here the Puget Sound Stevedoring Company acts as labor agent for the shipowner or ship master, supplying him with longshoremen to load and discharge the vessel. The stevedoring company here does not control or direct the operation of the individual longshoremen over whom the ship's officers assume complete supervision and direction. The stevedoring company merely collects the longshoremen and supplies them to the vessel and at the completion of their work advances the pay roll to pay them off, later billing the ship and her owner the amount of the pay-roll plus a commission for services. The pay-roll signed by the longshoremen, under the last method, contains the following clause:

"Received from the Master and Owners of the Steamer —— through the Puget Sound Stevedoring Company, as Master's representative, the sum set opposite our name in full and complete satisfaction for any and all services ren- [fol. 7] dered to such steamer, and the said steamer, master, owners and Puget Sound Stevedoring Company are hereby released from any and all further claims and demands."

The vessel usually furnishes to the stevedoring company winches, steam for the winches, booms, cargo falls, and other deck appliances. The stevedoring company usually supplies the slings, trucks, and other such cargo handling equipment. All cargo loaded or discharged by the Puget Sound Stevedoring Company is moving in interstate or foreign commerce, or both, being enroute to or from an interstate or

foreign point. While it performs stevedoring services for vessels under United States documentation engaged in the foreign, coastwise, and intercoastal trade, the bulk of its work is handling cargo received from or destined to vessels flying foreign flags.

Some vessel owners instead of employing a stevedoring company to load and discharge their vessels employ longshoremen as their direct employees to perform the necessary stevedoring for their ships. The nature of the services performed is identical, whether performed by longshoremen as employees of the vessel, or whether performed by contract between a stevedoring company and the vessel.

Attached to this statement, marked Exhibit B, is a copy of the agreement now existing between employers and employees engaged in the Stevedoring Industry in this state effective May 2, 1935. This pamphlet, with slight changes unimportant in this discussion, contains definitions and describes in some detail the character of the industry. It is a codification of this industry as it has existed and has been recognized in this state for many years.

As set forth in Exhibit B, the general method of stevedoring a vessel in the State of Washington and that employed by the plaintiff, Puget Sound Stevedoring Company, is as follows:

Each hold of the vessel is worked by a crew of men who are commonly called a "gang". The gang in general consists of the following:

1. Six men in the hold of the ship.

2. One or two winchdrivers depending upon whether the vessel is equipped with double or single winches.

[fol. 8] 3. A hatch tender or straw boss, who supervises the work of the gang.

4. Two sling-up men on the dock.

The men in the hold place the cargo upon a sling which is hoisted by the ship's gear from the hold, swung over the deck and lowered to the dock. There the ship's gear is disengaged and the load hauled away.

In loading a vessel the same method is employed as that outlined above, save in the reverse order. The cargo is delivered at the ship's side on a sling, which is attached by the sling-up men to the ship's tackle and then hoisted over

the side and lowered into the hold, where it is stowed by the hold men.

As set forth in Exhibit B, a longshoreman handles the cargo from the hold of the vessel until it has reached what is termed the "first place of rest", and vice versa. Cargo handled through side ports moves by truck from the hold through the side ports to the "first place of rest".

By the term "first place of rest", is meant the point to which, and the point from which, the cargo moves continuously from or to the hold of the ship. As soon as the continuity of movement ceases, the handling of the cargo ceases to be "longshoring", and becomes "dock work". The rate received by the individual workman likewise changes. For longshoring the workman receives normally 95¢ an hour; for dock work, 85¢ an hour.

Whether a stevedoring company begins and ends its services at the ship's sling, or at the "first place of rest", depends upon its arrangement with the vessel. If, however, the stevedoring company's services begin or end at the ship's sling, then the dock company must perform the stevedoring services between the "first place of rest" and the sling, employing longshoremen to do this work.

Except in very rare instances, not here involved, the water carrier's bill of lading imposes upon the vessel the obligation of accepting cargo alongside at ship's tackle and of [fol. 9] placing it aboard the vessel and stowing it. Likewise at destination the vessel assumes the obligation of discharging cargo and delivering it alongside at ship's tackle. In such case the carrier absorbs in its freight rate all expenses in connection with the handling of the cargo between the hold of the vessel and the reach of ship's tackle.

In some trades, the vessel also absorbs handling charges to the "first place of rest" from ship's tackle, and vice versa. In the event the carrier does not absorb such handling charges, they are billed to the shipper or consignee as an extra charge. Whether absorbed by the vessel in its freight rate or paid for as an extra charge, and whether performed by a stevedoring company or by a dock company, stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest", and vice versa.

Under current dock tariffs in this state, cargo upon discharge is allowed to remain on a dock for a number of days,

depending on the port and on the trade, without payment of any additional charge. At the expiration of this free time, a charge is made which may be considered in the nature of wharf demurrage.

The nature of stevedoring services are the same whether the origin or destination of the cargo is at the port where performed or at some interior point.

In some trades, the crew of the vessel still performs the stevedoring services, as the crew exclusively performed them in earlier days. But this is now quite rare due to a variety of causes, probably the most important reasons for the change being—

(a) Larger vessels, and smaller crews.

(b) Short stays in ports, as a result of faster schedules.

(c) The presence of competent, experienced and reliable longshoremen at all times in every port in sufficient numbers to afford quick dispatch of the vessel.

[fol. 10] The result has been that every seaport demands the services of experienced longshoremen sufficiently elastic in number to serve the normal and even peak demands of its waterborne trade. Any interruption in the service of such cargo handlers cripples the activities and business of a port and the free and steady flow of commerce and trade through the port is sharply and abruptly slowed, hindered and obstructed.

Longshore payrolls represent seventy to eighty per cent of the total invoice of a contract stevedore. Stevedoring charges (in and out) represent approximately one-fourth to one-third of the freight revenue earned by the vessel.

[File endorsement omitted.]

[fol. 11] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed March 19, 1936

Come now defendants in the above entitled action appearing on behalf of the state of Washington and for an answer to plaintiff's complaint admit, allege and deny:

I

Admit the allegations contained in paragraphs 1 and 2 thereof.

II

Admit that plaintiff is engaged in business in the state of Washington as an independent contractor and that the nature of work performed by plaintiff under contract is as described in exhibit "A" attached to plaintiff's complaint and made a part thereof by reference in paragraph 3.

III

Answering paragraphs 4 and 8 thereof these defendants admit that plaintiff is taxable with respect to the business of furnishing services under contract under the provisions of the business and occupation tax and admit that the tax will be collected by the ordinary process of law.

IV

Referring to paragraph 5 thereof defendants deny that the business activities of plaintiff are within the exclusive [fol. 12] jurisdiction and control of the United States of America and deny that the enforcement of the tax is in violation of article 1, section 8 of the constitution of the United States as a burden upon interstate or foreign commerce.

V

Referring to paragraph 6 thereof defendants deny that the imposition of the said business tax upon plaintiff constitutes a denial to plaintiff of the equal protection of the laws or is in violation either of the 14th Amendment to the constitution of the United States or article 1, section 12 of the constitution of the state of Washington.

VI

Referring to paragraph 7 thereof defendants deny that the said business tax or its imposition is either arbitrary, unreason-, excessive or confiscatory and denies that the imposition of said tax is a deprivation of property without due process of law.

VII

Defendants deny paragraph 9 thereof.

Wherefore having fully answered plaintiff's complaint defendants pray that the same be dismissed and that they have judgment for their costs.

G. W. Hamilton, Attorney. E. P. Donnelly, Assistant Attorney General.

[fol. 13] *Duly sworn to by E. P. Donnelly. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF THURSTON COUNTY

No. 16407

PUGET SOUND STEVEDORING COMPANY, a Corporation, Plaintiff,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner. Members of Said Commission, Defendants

JUDGMENT AND DECREE—Filed Aug. 3, 1936

This matter having heretofore come on regularly for hearing before the court, sitting without a jury, all parties being respresented by counsel and having respectively moved for judgment on the pleadings, the cause having been presented without testimony and the cause having been argued and the court having, on the 18th day of June, 1936, handed down its Memo Opinion directing that this action be dismissed; Now, therefore, it is by the court

Ordered, Adjudged and Decreed that this action be and the same is hereby dismissed with prejudice and with statutory costs. To all of which the plaintiff duly excepts and its exception is allowed.

Done in Open Court this 3rd day of August, 1936.

John M. Wilson, Judge.

Approved as to form. E. P. Donnelly, Asst. Atty. Genl.

[File endorsement omitted.]

[fol. 15] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed August 3, 1936

To the Tax Commission of the State of Washington, and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, members of said Commission, and to its and their attorneys, G. W. Hamilton, Attorney General, and E. P. Donnelly, Assistant Attorney General:

You and Each of You are hereby notified that Puget Sound Stevedoring Company, a corporation, the above named plaintiff, feeling itself aggrieved, has appealed and does hereby appeal to the Supreme Court of the State of Washington from the judgment and decree of the Superior Court of Thurston County, Washington, made and entered herein on the 3rd day of August, 1936, and from each and every part thereof.

Dated this 3rd day of August, 1936.

Grosscup, Morrow & Ambler, Attorneys for Plaintiff.

Service of the foregoing Notice of Appeal admitted and a copy thereof received this 3rd day of August, 1936.

W. A. Toner, Asst. Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 16] IN SUPREME COURT OF WASHINGTON

No. 26324

PUGET SOUND STEVEDORING COMPANY, a Corporation, Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of said Commission, Respondents

ASSIGNMENTS OF ERROR—Filed August 19, 1936

1. The trial court erred in holding that the appellant is an independent contractor.

2. The trial court erred in holding that the appellant is not engaged in Interstate and Foreign Commerce.

3. The trial court erred in holding that Chapter 191, Laws of Washington 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933, and Chapter 180, Laws of Washington 1935, commonly known as the Business and Occupation Tax, contemplates or authorizes the imposition of a tax upon the operations of the appellant.

4. The trial court erred in holding that the imposition and collection from the appellant of the Business and Occupation Tax does not impose a burden, hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

5. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant, and not upon a ship owner when doing his own stevedoring, does not render the law discriminatory as being in violation of Article I, Section 12, of the Constitution of the State of Washington.

[fol. 17] 6. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant, and not upon a ship owner when doing his own stevedoring, does not deprive the plaintiff of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

7. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law in violation of Article I, Section 3, of the Constitution of the State of Washington.

8. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

9. The trial court erred in failing to hold that Chapter 191, Laws of Washington 1933, as amended by Chapter

57, Laws of Washington Extraordinary Session 1933, and Chapter 180, Laws of Washington 1935, commonly known as the Business and Occupation Tax, does not contemplate nor authorize the imposition of a tax upon the operations of the appellant.

10. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations is an unlawful and illegal burden, hindrance and obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3), of the Constitution of the United States.

11. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations, and not upon a ship owner doing his [fol. 18] own stevedoring, is discriminatory as being in violation of Article I, Section 12, of the Constitution of the State of Washington.

12. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations, and not upon a ship owner doing his own stevedoring, does not deprive the appellant of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States.

13. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax law upon the appellant deprives the appellant of its property without due process of law in violation of Article I, Section 3, of the Constitution of the State of Washington.

14. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax law upon appellant deprives the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

15. The trial court erred in dismissing the action and granting judgment in favor of the respondents.

16. The trial court erred in failing to find for the appellant, and in failing to grant judgment in its favor.

[File endorsement omitted.]

[fol. 19] IN SUPREME COURT OF WASHINGTON

[Title omitted]

STIPULATION RE FORM OF CONTRACT—Filed September 18, 1936

It is Hereby Stipulated by and between the above entitled parties through their respective counsel that this stipulation may be filed by the Clerk and considered by the Court as a part of the record on appeal in this case.

It is Further Stipulated that the form of contract attached to this stipulation is the standard form used by Puget Sound Stevedoring Company in connection with its business of loading and discharging vessels under the first and second methods described in Exhibit A, attached to and made a part of the complaint filed in this action.

Dated this 17th day of September, 1936.

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Respondents. Grosscup, Morrow & Ambler, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 20] EXHIBIT TO STIPULATION

Puget Sound Stevedoring Company, Inc.,

Seattle, Washington

Agreement made this date: —— —, 193-, between the —— ——, and the Puget Sound Stevedoring Co., Inc.

The Stevedoring Company Agrees:

(1) To discharge and/or load all cargoes of all vessels owned, controlled, chartered or managed by the Shipping Company at all ports in the Puget Sound district.

(2) To take delivery of cargo on wharf or lighter or in booms alongside ship at end of ship's tackle; or at mouth of chute or conveyor where such is used; and to deliver cargo on wharf or lighter alongside ship at end of ship's tackle.

(3) To carry out the work with all reasonable dispatch and in a careful manner to the satisfaction of the ship's officers and/or representatives of the Shipping Company.

(4) To observe and abide by the Longshore Labor agreements.

(5) In event of labor trouble to exercise its best efforts to forward the work, but is not to be held liable for loss to, or detention of, vessels of the Shipping Company; furthermore the rates quoted herein are not to apply, but special rates for the duration of the trouble shall be agreed upon.

(6) To provide satisfactory insurance: (a) Complying with the Federal and State Compensation Acts; (b) Protecting its liability to the Public; also (c) holding harmless the Shipping Company against any claim or action which may be brought by any employee of the Stevedoring Company for personal injury or death alleged to be sustained as a result of its stevedoring operations during the progress of the work on or around the Shipping Company's vessels, excepting where caused by fault of the Ship's officers, crew or equipment.

(7) To indemnify the shipping Company for all loss of cargo or damage to ship or cargo caused by its employees during the progress of the work, attention being called to and understanding had of such loss or damage at time of occurrence, except where caused by ship's officers, crew or equipment. The Stevedoring Company will not be responsible for cargo after same is landed on wharf, car or lighter alongside or before delivered to ship's sling.

The Shipping Company Agrees:

(8) To have the Stevedoring Company discharge and/or load all cargoes of all vessels owned, controlled, chartered or managed by the Shipping Company at all ports in the Puget Sound district.

(9) To provide a safe place for the Stevedoring Company employees.

(10) To furnish adequate deck appliances, winches in good order and with sufficient power, booms, blocks, falls, sufficient lights, etc.

(11) To pay in full in United States Currency within five days from date of bill at the attached contract rates which are a part of this contract.

(12) In event of increase in present longshore wages or changes in hours or working conditions, to allow an increase in present stevedore rates as determined by the Association of Washington Stevedores and the Shipping Interests jointly; in event of a decrease the Stevedoring Company will allow a decrease in rates similarly.

[fol. 21] (13) Work done under the following conditions is for ship's account, the Stevedoring Company to be reimbursed for its payroll cost plus insurance plus a management fee as specifically set forth:

(a) Special Work.—The attached contract rates are for handling cargo in regular holds only; in deep tanks, cross bunkers, ship's refrigerators, poops, peaks and in similar compartments, or for loading cargo on top of bulk wheat with less than six feet head room; Plus —%.

(b) Ship's Time.—Shifting or restowing cargo, shifting coal or dunnage, cleaning holds and any other ship's work including handling mails or baggage, rigging and unrigging special gear, handling lines, shifting scows, etc.; Plus —%.

(c) Minimum Cargo.—Cargo at any one port of less than 50 Tons or cargo in any one hold of less than 5 Tons may be handled on contract rates or at Plus 10%, at Stevedoring Company's option.

(d) "Explosives" or "Damaged Cargo" as defined in the Labor Agreement; Plus —%.

(e) Overtime.—For work performed during overtime, as defined in the Labor Agreement, the Stevedoring Company is to be reimbursed for the difference in straight and overtime; Plus —%.

(f) Waiting and Standby Time.—Payroll costs to be reimbursed to the Stevedoring Company by the Shipping Company.

(g) Transportation, Etc.—Expenses borne by the Stevedoring Company for Transportation, Travel Time, Sub-

sistence, Launch Hire, etc. in transferring longeshoremen when required, to be reimbursed by the Shipping Company.

(h) Hatch Tents.—When required by Ship—$7.50 per tent-day.

(1) Heavy Lifts:

5000	Lbs.	to	10000	Lbs.	.....	Each.
10001	"	"	15000	"	.....	"
15001	"	"	20000	"	.....	"
20001	"	"	30000	"	.....	"
30001	"	"	40000	"	.....	"
40001	"	"	60000	"	.....	"

Crane Hire for handling Heavy Lifts to be at ship's expense.

The foregoing mutual understanding and agreement shall bind for one year from date; and shall continue in force until terminated by either party on 30 days' written notice.

——, by —— ——.

Witness: —— ——.

Puget Sound Stevedoring Co., Inc., by —— ——.

Witness: —— ——.

[fol. 22] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed April 8, 1937

The court having considered appellant's petition, concurred in by various amici curiæ, for a rehearing herein, together with respondents' answer thereto;

It is Ordered that the petition be and it hereby is denied.

Dated this 7th day of April, 1937.

By the Court.

Wm. J. Steinert, Chief Justice.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF WASHINGTON

No. 26324

Thurston County No. 16407

PUGET SOUND STEVEDORING COMPANY, a Corporation, Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and H H. HENNEFORD, et al., Members of Said Commission, Respondents

JUDGMENT—April 8, 1937

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 8 day of April, A. D. 1937, on motion of G. W. Hamilton, Attorney General Esquire, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said The Tax Commission of the State of Washington, et al have and recover of and from the said Puget Sound Stevedoring Company and from American Bonding Company of Baltimore, Surety, the costs of this action taxed and allowed at Seventy-two and 15/100 ($72.15) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Volume 33, page 345, of the records of the Supreme Court.

[fol. 24] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER OF SEVERANCE—Filed April 17, 1937

The motion of Puget Sound Stevedoring Company, a corporation, appellant in the above action, for an order of severance having come on for hearing and it appearing that a notice of summons and severance has been duly given to American Bonding Company of Baltimore, a Maryland corporation, and it further appearing that said American Bonding Company of Baltimore, a Maryland corporation, has duly consented in writing to the entry of the Order of Severance; Now, therefore, it is

Ordered, Adjudged and Decreed that American Bonding Company of Baltimore, a Maryland corporation, not appealing from the final judgment and decree of the Supreme Court of the State of Washington dated April 8, 1937, to the Supreme Court of the United States, said corporation is hereby severed from Appellant Puget Sound Stevedoring Company, a corporation, on its appeal to the Supreme Court of the United States from said judgment and decree of the Supreme Court of the State of Washington, and said American Bonding Company of Baltimore, a Maryland corporation, is hereby barred from ever thereafter appealing from said judgment and decree.

Done this 17th day of April, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

O. K. E. P. Donnelly, Asst. Atty. Genl.

[fol. 25] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 17, 1937

The petitioner and appellant assigns the following errors in the records and proceedings in this cause:

1. The Supreme Court of the State of Washington erred in failing to hold that the operations of the appellant in handling cargo in continuous movement in Interstate and Foreign Commerce from the hold of a vessel to first place of rest and vice versa form an essential and component part of and an essential link in Interstate and Foreign Commerce.

2. The Supreme Court of the State of Washington by its judgmnet erred in failing to hold that the appellant is engaged solely in Interstate and Foreign Commerce.

3. The Supreme Court of the State of Washington by its judgment erred in holding that appellant is not a necessary factor in Interstate and Foreign Commerce but merely renders an independent service of advantage to those actually forming a necessary and component part or link in such commerce.

4. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the Business and Occupation Tax (Chapter 191 Laws of Washington 1933, as amended by Chapter 57 Laws of Washington Extraordinary Session 1933 and Chapter 180 Laws of Washington 1935) upon its gross income does not impose a burden, [fol. 26] hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8, of the Constitution of the United States.

5. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition of said Business and Occupation Tax upon appellant, and not upon a ship-owner doing its own stevedoring, does not deprive the appellant of the equal protection of the laws in violation

of the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition of said Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

7. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of said Business and Occupation Tax upon appellant's gross income is an unlawful and illegal burden, hindrance and obstruction upon Interstate and Foreign Commerce, in violation of Article I, Section 8, of the Constitution of the United States.

8. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations and not upon a ship-owner doing its own stevedoring deprives the appellant of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

9. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the [fols. 27-40] Business and Occupation Tax upon the business of appellant deprives appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying injunctive relief against the imposition and collection of the Business and Occupation Tax upon appellant's gross income, and in dismissing the action filed by the appellant and granting judgment in favor of the appellees.

11. The Supreme Court of the State of Washington by its judgment erred in failing to grant to appellant the relief sought in this action and in failing to grant judgment in its favor.

Wherefore, on account of the Errors hereinabove assigned, petitioner prays that the said judgment of the Supreme Court of the State of Washington dated the 8th day of April, 1937, in the above entitled cause be reversed and judgment be rendered in favor of this appellant.

Dated this 17th day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant.

[fol. 41] In Superior Court of Thurston County

No. 16407

Puget Sound Stevedoring Corporation, Plaintiff,

vs.

The Tax Commission of the State of Washington, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of said Commission, Defendants

Memo. Opinion

This is an action to enjoin the State Tax Commission from enforcing against the Plaintiff the provisions of the business and occupation tax law (Chapter 191, Laws of 1933 as amended by Chapter 57, Laws of extra session 1933 and Chapter 180, Laws of 1935).

Exhibit "A," attached to the complaint is a concise statement of the nature and scope of Plaintiff's business. From it, I am satisfied that Plaintiff is an independent contractor, locally engaged in furnishing service to carriers engaged in interstate commerce and that Plaintiff is not engaged in interstate commerce and under the cases cited and examined, I am of the opinion that the collection of the tax imposed by the law does not impose a burden, hindrance or obstruction upon interstate commerce.

The fact that the tax is imposed upon stevedoring companies and not upon a ship owner when doing its own stevedoring, does not render the law discriminatory and does not violate the equal protection clause of the Constitution. Neither does the law deprive the plaintiff of its property without due process of law.

A vast number of cases have been cited in the briefs, most of which have been examined and from those ap-

plicable to the facts herein I reach the above conclusion. Judgment may be for defendants, dismissing the action.

John M. Wilson, Judge.

[fol. 42] IN SUPREME COURT OF WASHINGTON

DEPARTMENT TWO

No. 26324

PUGET SOUND STEVEDORING COMPANY, a Corporation, Appellant,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of said Commission, Respondents

OPINION—Filed January 6, 1937

This is an appeal from a judgment dismissing, with prejudice, an action instituted to secure injunctive relief against the application to and enforcement against appellant of the so-called "Business and Occupation Tax Laws" as contained in Chap. 191, Laws of 1933, as amended and added to by Chap. 57, Ex. Sess. Laws of 1933 and Chap. 180, Laws of 1935.

In asserting that the business and occupational tax laws are not applicable to appellant, it is argued that appellant's business activities are within the exclusive jurisdiction and control of the Federal government inasmuch as the tax, if enforced against appellant, would amount to a burden, hindrance and obstruction upon interstate and foreign commerce contrary to Art. I, § 8, of the United States Constitution and further that the imposition of the tax upon appellant would constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and of Art. I, § 12, of our state constitution in that the tax could not be imposed upon shipowners doing their own stevedoring instead of employing the services of an independent contractor, such [fol. 43] as appellant. It is finally claimed that the imposition of the tax would deprive appellant of its property without due process of law in violation of the Fourteenth

Amendment to the Constitution of the United States and Art. I, §3, of the constitution of this state in that such tax is arbitrary, unreasonable, excessive and confiscatory.

Appellant, a Washington corporation, is now and for some years past has been engaged solely in the business of stevedoring at different ports within the state. It carries on its business by means of contracts which it makes with shipowners or shipmasters. These contracts are of three types; the first two provide for loading cargo on or discharging it from a ship, appellant employing the stevedores over whom it exercises control and whose operations it directs under general instructions and supervision of the ship's master. These contracts differ only in the method of determining the compensation to be paid appellant. By the third type of contract appellant, for a consideration, merely supplies the stevedores who work under the direction and complete supervision of the ship's officers, appellant advancing the pay to the laborers and thereafter collecting from the shipowner or master the amount of the payrolls, plus commission for services. Under the first two types of contracts the winches and steam for operating them, the booms, cargo-falls, and other deck appliances are usually supplied from the ship, while the slings, trucks and other cargo handling equipment are furnished by appellant. All the cargo handled under all three types of contracts moves in either interstate or foreign commerce or both and most of it is loaded on or unloaded from vessels flying foreign flags. The men hired by or through the company work on the ship or dock, or both. A further fact to be noted is that some shipowners employ stevedores without engaging [fol. 44] the services of a stevedoring company and in some instances the ship's crew does the stevedoring work.

We are satisfied that the record fully supports respondent's contention that appellant makes its contracts and renders its services thereunder as an independent contractor. Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. Ed. 480.

The real question, however, is whether the excise tax constitutes such a burden on interstate and foreign commerce as to violate the Federal constitution.

1 Cooley on Taxation, 4th ed., § 374, says:

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers

interstate commerce, it must appear that the burden is direct and substantial and not merely incidental and fortuitous. A tax is not invalid merely because it affects interstate commerce and impedes the transit of persons and property from one state to another 'just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' "'

To the same effect is 14 Fletcher on Corporations, Rev. Ed., 431. Both of these texts cite numerous decisions from the United States Supreme Court.

Appellant argues that as it actually participates in the movement of interstate and foreign commerce and as the tax is upon the gross receipts from such commerce, it is a direct tax upon every ton of cargo moved and, hence, is unconstitutional according to McCall v. California, 136 U. S. 104; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150, and Di Santo v. Pennsylvania, 273 U. S. 34. [fol. 45] Without detailing the facts of these three cases it is noted that each involves the imposition of a license tax directly upon the carrier of interstate and foreign commerce. In this case the tax is not imposed upon, or because of the kind of business appellant is engaged in, but rather upon the act or privilege of engaging in business activities without regard to its kind or nature.

A review of most of the authorities cited by counsel for both parties would lengthen this opinion unduly and is not necessary. We shall base our decision upon a few cases by the United States Supreme Court which are controlling in principle.

Bearing in mind that the business and occupational tax contained in the state revenue act imposes, indiscriminately, an excise tax upon every person for the privilege of doing business in this state; that appellant is a domestic corporation operating an independent business entirely within this state; that the tax is not upon imports, exports or interstate or foreign commerce and that appellant is not a necessary factor in such commerce but has built up and renders an independent service which is advantageous to those who actually form a necessary and component part or link in such commerce, it is inconceivable that the imposition of such an excise conflicts or is inconsistent with any federal or state constitutional provision.

In Ficklen v. Shelby County Taxing District, 145 U. S. 1, that court affirmed a judgment of the supreme court of [fol. 46] Tennessee, sustaining a law of that state providing for a tax upon brokers and all persons not having a regularly licensed house of business in the taxing district of Shelby county to pay a tax of ten dollars per week, or twenty-five dollars per month for such privilege. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods, situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution.

"The language of the court in Lyng v. State of Michigan, 135 U. S. 161, 166, was: 'We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business.

* * * * * * *

"* * * It is well settled that a state has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196."

In Hump Hairpin Co. v. Emmerson, 258 U. S. 290, it was held that a state law of West Virginia providing for taxing

foreign corporations for the privilege of doing local busi-
[fol. 47] ness, which based the tax upon the capital stock actually represented by property located and business transacted within the state, plainly intending not to tax interstate commerce, reasonable as to amount and free from discrimination in favor of local corporations, is not unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. Among other things, the court there said:

"While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

Several cases are cited to sustain that principle and the court then continued:

"* * * The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

The United States Supreme Court sustained the law, which has been sustained by this court, in Pacific Telephone & Telegraph Co. v. Tax Commission, 56 Sup. Court Rep. 522, and several kindred cases, in which that court held that a state tax upon a local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce, since the question of constitutional validity is not to be determined by artificial standards, but an alleged indirect tax must be judged by its practical operation. It reiterated that while a state may tax the privilege of engaging in local business, it may not
[fol. 48] tax the privilege of engaging in interstate commerce, and any tax laid directly upon the privilege is void, even in the absence of legislation by Congress or a finding of prejudice.

These cases control and it is needless to go further afield in our inquiry.

The judgment is affirmed.

Holcomb, J.

We concur: Millard, C. J. Mitchell, J. Beals, J. Tolman, J.

[fol. 49] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed April 17, 1937

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Puget Sound Stevedoring Company, a corporation, respectfully shows:

That your petitioner is the appellant in the above entitled cause; that on January 13, 1936, your petitioner filed its complaint against the appellees above named in the Superior Court of the State of Washington for Thurston County, alleging that a statute of the State of Washington, to-wit, the Business and Occupation Tax (Chapter 191, Laws of Washington 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933, and Chapter 180, Laws of Washington 1935, being Sections 8370-4 to 8370-15, inclusive, of Remington's Revised Statutes of the State of Washington, 1936 Pocket Supplement), which purport to impose a tax or excise upon the gross receipts of petitioner for the privilege of engaging in the stevedoring business within the State of Washington, is repugnant to, and in conflict with, Section 8 of Article I of the Constitution of the United States, in that said tax or excise imposes a burden, hindrance or obstruction upon interstate or foreign commerce and upon the free and steady flow and movement of the same; likewise is repugnant to, and in conflict with, the Fourteenth Amendment to the Constitution of the United States in that said [fol. 50] tax or excise constitutes a denial to petitioner of the equal protection of the laws in violation of said Amend-

ment to the Constitution of the United States; likewise that the imposition of said tax or excise upon petitioner for the privilege of engaging in its business activities in the State of Washington is a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that said tax or excise is arbitrary, unreasonable, excessive and confiscatory.

Equitable grounds were alleged for and the issuance of an injunction was requested against the appellees above named, enjoining and restraining them from enforcing said Business and Occupation tax against petitioner.

Thereafter an answer was duly filed by appellees and the case was presented to the Honorable Judge of the Superior Court of Thurston County, the parties orally stipulating in open court that any affirmative matter contained in appellees' answer be deemed denied without the necessity for filing any formal reply thereto. At the conclusion of the hearing both parties moved for judgment on the pleadings and the cause was duly submitted to the court for final determination on the merits. Thereafter the court rendered its oral decision finding for the appellees. On August 3, 1936 a final judgment and decree was entered in the Superior Court of the State of Washington for Thurston County, dismissing the action with prejudice and with costs, petitioner duly excepting to said final judgment and decree and its exception was allowed.

An appeal from said final judgment and decree dismissing the action was taken to the Supreme Court of the State of Washington. The Supreme Court of the State of Washington on January 6, 1937, affirmed the action of the lower court. The opinion of the Supreme Court in its entirety [fol. 51] dealt with the question of the validity of the Business and Occupation Tax in respect to the Constitution of the United States and found that said statute in its application to petitioner is not in conflict with, or repugnant to, the Commerce Clause of the Constitution of the United States, nor does said Act deny petitioner the equal protection of the laws, nor deprive the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Within due time your petitioner filed its petition for rehearing, and thereafter said petition for rehearing was denied on April 8, 1937, and final judgment of said Supreme

Court denying the petitioner relief and affirming the dismissal of the action was entered on April 8, 1937. The Supreme Court of the State of Washington is the highest Court of said State in which a decision in this suit can be had. In said cause there is drawn into question the validity of a Statute of the State of Washington on the ground that said statute in its application to petitioner is repugnant to the Constitution and Laws of the United States of America and the decision of the highest Court of the State of Washington is in favor of its validity, notwithstanding your petitioner's contention that said Statute violates Article I, Section 8, of the Constitution of the United States and the Fourteenth Amendment thereto.

Therefore in accordance with Section 237-a of the Judicial Code (28 U. S. C. A. 344), and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237-a of the Judicial Code (28 U. S. C. A. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right. The errors upon which your petitioner claims to be entitled to an appeal are more fully [fol. 52] set out in the assignment of errors filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Washington, the highest court of said state in which a decision in this case can be had, to the Supreme Court of the United States in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the records, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington under his hand and the seal of said court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made ad-

judging the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Dated this 17 day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant.

Serv. acknowledged. E. P. Donnelly, Asst. Atty. Genl.

[fol. 53] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 17, 1937

The petition of Puget Sound Stevedoring Company, a corporation, the appellant in the above entitled cause, for an order allowing an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this court and presented herein, accompanied by an Assignment of Errors and Statement as to Jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States of America from the final judgment, dated the 8th day of April, 1937, of the Supreme Court of the State of Washington, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty (60) days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of said court, a true copy of the material parts of the record herein which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States; it is further

Ordered that said appellant shall give a good and suf-
[fol. 54] ficient cost bond in the sum of One Thousand Dol-

lars that said appellant shall prosecute said appeal to effect, and answer all costs, if it fails to make its plea good.

Dated this 17th day of April, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

O K. E. P. Donnelly, Asst. Atty. Genl.

[fols. 55-56] Bond on Appeal for $1,000.00, approved and filed April 17, 1937, omitted in printing.

[fols. 57-60] Citation in usual form, showing service on G. W. Hamilton et al., filed April 17, 1937, omitted in printing.

[fol. 61] In Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record—Filed April 17, 1937

It is Hereby Stipulated between Puget Sound Stevedoring Company, a corporation, appellant above named, and The Tax Commission of the State of Washington, and Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, members of said Commission, the appellees above named, by and through their respective counsel, as follows:

That the Clerk of the Supreme Court of the State of Washington, is hereby instructed to prepare the record on appeal in the above entitled cause, and that the following papers shall be included in and shall constitute said record on appeal:

1. Complaint (omitting "Exhibit B" thereto).
2. Answer.
3. Judgment and decree of the Superior Court dated August 3, 1936.
4. Notice of appeal to the Supreme Court of the State of Washington.

5. Assignments of error on appeal to the Supreme Court of the State of Washington.

6. Stipulation dated September 17, 1936, with attached "Exhibit A", except last page thereof.

7. Order of Supreme Court of the State of Washington denying petition for rehearing.

8. Judgment of the Supreme Court of the State of Washington.

9. Order of severance.

10. Assignments of error on appeal to the Supreme Court of the United States.

[fol. 62] 11. Statement as to jurisdiction with attached copies of the decision of the Superior Court of Thurston County and the Supreme Court of the State of Washington.

12. Petition for appeal.

13. Order allowing appeal and fixing cost bond.

14. Cost bond.

15. Citation.

16. Statement directing attention to United States Supreme Court Rule 12.

17. Proof of service of papers required by United States Supreme Court Rule 12.

18. Stipulation for transcript on appeal.

19. Clerk's certificate.

Dated this 17th day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant. G. W. Hamilton, E. P. Donnelly, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 18, 1937

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and

represents that the whole of the record as filed is necessary for the consideration of the case.

Dated this 17th day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant.

Due and timely service of the foregoing "Appellant's Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed" acknowledged this 17th day of April, 1937.

G. W. Hamilton, Attorney General of the State of Washington. E. P. Donnelly, Assistant Attorney General of the State of Washington, Attorneys for Appellees.

[fol. 65] [File endorsement omitted.]

Endorsed on cover: File No. 41,540. Washington Supreme Court. Term No. 68. Puget Sound Stevedoring Company, appellant, vs. The Tax Commission of the State of Washington, et al., etc. Filed May 18, 1937. Term No. 68, O. T. 1937.